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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

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COURT OF CRIMINAL APPEALS
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DEANA WILLIAMSON, CLERK

KENYETTA DANYELL WALKER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Orange County
Cause No. 07-16-00245-CR

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STATE'S REPLY BRIEF

* * * * *

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STATE'S REPLY BRIEF

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

ARGUMENT

In its opening brief, the State asks that the judgment of engaging in organized criminal activity (EOCA) be reformed to the necessarily included target offense of possession with the intent to deliver. To reform the judgment, the jury must have "necessarily found every element" of the lesser. *Thornton v. State*, 425 S.W.3d 289, 300 (Tex. Crim. App. 2014). In her reply brief, Appellant essentially argues that the jury did not necessarily find the elements of possession because, under the jury charge's application paragraph for EOCA, the jury could have convicted her of only attempted EOCA as a party. App. Brief at 8 ("the instructions . . . told the jury that

it could convict Walker if the jury believed that she attempted to aid another person to commit the offense of engaging in organized criminal activity."); App. Brief at 11 ("The jury could have convicted Walker even if she only attempted to aid another in the commission of the 'offense' of conviction."); App. Brief at 13 ("the primary instructions related in part to an inchoate lesser offense").

The application paragraph for EOCA reads as follows:

> You must decide whether the State has proved, beyond a reasonable doubt the following elements. The elements are that —
>
> 1. One or more of the following persons: [Appellant, her first accomplice, or her second accomplice] possessed [the controlled substance in the county and on the date alleged]; and
> 2. The [controlled substance weighed at least 400 grams]; and
> 3. Such person knew he/she was possessing a controlled substance; and
> 4. Such person intended to deliver the controlled substance; and
> 5. the defendant intended to establish, maintain, or participate in a combination or the profits of a combination.
>
> If the person you found in #1, 3 and 4 was not the defendant, then the State must prove beyond a reasonable doubt that the defendant acted with intent to promote or assist the commission of the offense, and she aided or attempted to aid the other person to commit the offense.

CR 61. Appellant relies on this last sentence to argue she may have been convicted of only attempted EOCA.

Appellant misreads the jury charge in a number of ways. First, the reference to "offense" does not, as Appellant understands, mean EOCA; it refers to the

possession offense. This is the only reading that makes sense. It is an instruction that if the jury believes Appellant did not possess the controlled substance herself, to convict for EOCA, the jury must believe she was a party to the others' possession.[1] The phrase "If the person you found in #1, 3 and 4" provides the necessary context. Elements #1, 3 and 4 are the elements having to do with the offense of possession. Appellant's interpretation, on the other hand, would have the jury convict if, believing Appellant did not possess the controlled substance herself, they believed Appellant acted with intent to promote or assist EOCA and aided or attempted to aid another person to commit EOCA. Besides being circular, this reading is not plausible because there is no other reference to someone else committing EOCA.

Appellant is also wrong in believing the jury was given the option to convict Appellant of an attempted offense. This same sentence from the charge includes

[1] Ironically, the jury charge language that Appellant relies on is actually how we know the jury "necessarily found every element necessary to convict" Appellant of possession with intent to deliver. *Thornton*, 425 S.W.3d at 300. The EOCA conviction required the jury to believe she was criminally responsible for that offense, either as a principal or a party. *See McIntosh v. State*, 52 S.W.3d 196, 201 (Tex. Crim. App. 2001) (party liability can support conviction for EOCA by committing—not just conspiring to commit—the target offense). If the jury charge had submitted EOCA either by committing the target offense or by conspiring to commit it, then the jury would not necessarily have convicted Appellant of possession. This is not what happened. Moreover, since the degree of offense is lower for EOCA by conspiracy, TEX. PENAL CODE § 71.02(c), appellate courts should nearly always be able to tell if the EOCA conviction necessarily includes a finding of guilt on the target offense.

statutory parties language: "act[ing] with intent to promote or assist the commission of the offense, [s]he aid[ed] or *attempt[ed] to* aid the other person to commit the offense." TEX. PENAL CODE § 7.02(a)(2) (emphasis added). From this language, Appellant concludes the jury could have found her "guilty of an attempted offense as contemplated by Texas Penal Code § 15.01." App. Brief at 8. But even if the jury believed Appellant only "attempted to aid" the principal, the legal significance of this language is complicity in a completed offense, not an attempt. The Texas complicity statute follows Model Penal Code § 2.06(3)(a)(ii), which provides that a defendant may be guilty as a party to a completed offense even if she only "attempts to aid" the principal. The Commentaries explain:

> The inclusion of ["]attempts to aid["] may go in part beyond present law, but attempted complicity ought to be criminal, and to distinguish it from effective complicity appears unnecessary where the crime has been committed. Where complicity is based upon agreement or solicitation, one does not ask for evidence that they were actually operative psychologically on the person who committed the offense; there ought to be no difference in the case of aid.

Model Penal Code Commentaries, § 2.06 cmt. at 314 (American Law Institute 1985) (explaining that the statute sets out "an exhaustive description of the ways in which one may purposely enhance the probability that another will commit a crime.").

In sum, because the jury charge required the jury, in convicting Appellant of EOCA, to believe Appellant was also guilty of possession with intent to deliver, either as a principal or a party, reformation to that offense is appropriate.

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reform the judgment to possession of a controlled substance with intent to deliver (or, alternatively, remand to the court of appeals for reformation) and remand to the trial court for new punishment proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 1,032 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ Emily Johnson-Liu
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CERTIFICATE OF SERVICE

The undersigned certifies that on this 22nd day of January 2018, the State's Brief was served on the parties below as indicated:

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